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No. 90-1766

In The

Supreme Court of the United States

October Term, 1990

FEDERAL EXPRESS CORPORATION,

Petitioner,

vs.

TENNESSEE PUBLIC SERVICE COMMISSION, KEITH BISSELL, FRANK COCHRAN, STEPHEN HEWLETT,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly abstained from enjoining a state agency's decision in a judicial-type proceeding where important state interests are at stake and where, on the day the plaintiff filed suit in federal court, the plaintiff and the state agency were already litigating the same issues in a state-court appeal of the agency's decision.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

The respondents urge that the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on February 14, 1991, be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, entered on February 14, 1991 (reprinted in the Appendix to the Petition at A-1), is reported at 925 F.2d 962 (6th Cir. 1991). The district court's opinion,

entered on April 23, 1990 (reprinted in the Appendix at A-16), is reported at 738 F. Supp. 1140 (M.D. Tenn. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 14, 1991. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(a).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49, § 1305(a)(1). (Reproduced in pertinent part.)

> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

United States Code, Title 49, § 1302(b). (Reproduced in pertinent part.)

> (b) Factors for all-cargo air service
>
> In addition to the declarations of policy set forth in subsection (a) of this section, the Board, in the exercise and performance of its powers and duties under this chapter with respect to all-cargo air service shall consider the following, among other things, as being in the public interest:

> (1) The encouragement and development of an expedited all-cargo air service system, provided by private enterprise, responsive to (A) the present and future needs of shippers, (B) the commerce of the United States, and (C) the national defense.
>
> (2) The encouragement and development of an integrated transportation system relying upon competitive market forces to determine the extent, variety, quality, and price of such services.
>
> (3) The provision of services without unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing.

Supremacy Clause of the United States Constitution, Article VI, Clause 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Commerce Clause of the United States Constitution, Article I, § 8, Clause 3 (reproduced in pertinent part).

> The Congress shall have power . . .
>
> To regulate Commerce with foreign Nations, and among the several states, and with Indian Tribes.

STATEMENT OF THE CASE

This lawsuit arises from a decision of the Tennessee Public Service Commission (the Commission) requiring the petitioner, Federal Express Corporation, to apply for a state license to operate in Tennessee as a regulated truck company. The facts and procedural history of this suit are not at issue and are accurately described in the district court's opinion, *Federal Express Corp. v. Tennessee Public Service Commission*, 693 F. Supp. 598, 599-602 (M.D. Tenn. 1980).[1]

In sum, Federal Express – predominantly an air carrier – operates a sizeable intrastate trucking operation. Every day, the company's trucks carry about 500 packages from a Tennessee shipper to a Tennessee receiver. *Id.* at 600. These packages travel wholly by truck; they never leave the ground. State law therefore requires the company to obtain a certificate of convenience and necessity from the Tennessee Public Service Commission to operate as an intrastate motor carrier. Tenn. Code Ann. § 65-15-107. Federal Express already has motor carrier certificates from California, Massachusetts, and the Interstate Commerce Commission.[2]

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[1] Although the Commission does not dispute any of the district court's factual findings, the Commission's own findings, which were made following a judicial-type administrative hearing, are binding on the parties and the Court. *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1988); *Fourake v. Perry*, 667 S.W.2d 483, 486 (Tenn. App. 1983).

[2] Trial Transcript (September 10, 1987), 17-19.

The only substantive issue in this case is whether federal law, which preempts state regulation "relating to rates, routes, or services of any [federally certified] air carrier,"[3] also overrides Tennessee's regulation of Federal Express's intrastate trucking operations. The only court to reach the merits of this issue has ruled in favor of state regulation. *Federal Express Corp. v. California Public Utilities Commission*, 716 F. Supp. 1299 and 723 F. Supp. 1379 (N.D. Cal. 1989), appeal pending.

These proceedings began on July 2, 1986, when the Commission directed Federal Express to "appear and show cause" why the company should not cease providing intrastate ground transportation services as a common carrier without first obtaining a certificate of convenience and necessity from the Commission. Purolator Courier, a state-regulated carrier which also operates an air-and-ground, express package service in competition with Federal Express, intervened in support of the Commission's position.

Following a two day, trial-type hearing conducted under the Tennessee Uniform Administrative Procedures Act (Tenn. Code Ann. § 4-5-301, *et seq.*), an administrative judge issued a lengthy opinion concluding that the company's intrastate trucking operations were subject to the Commission's jurisdiction. The Commission itself then reviewed the case and, following oral argument and the filing of additional briefs, issued a twenty-five page opinion affirming the administrative judge's decision and

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[3] *See* § 105 of the Airline Deregulation Act of 1978, 49 U.S.C. 1305(a).

analyzing in some detail the various preemption issues raised by Federal Express. *Id.* at 601. *See Show Cause Order Against Federal Express Corporation*, Docket No. SMC-977, Tennessee Public Service Commission, June 9, 1987 (hereafter, the *Show Cause Order*), printed in the Supplemental Appendix to the Petition at page SA-9.

The Commission gave Federal Express thirty days to file an application for intrastate authority, later extending that deadline to August 25, 1987. The Commission did not address what type, if any, of regulatory restrictions might apply to Federal Express,[4] but assured the company that no enforcement action would be taken during the months needed to consider the company's application:

> The Commission recognizes that Federal Express has many existing Tennessee customers which currently use Federal Express to make Tennessee intrastate shipments. Rather than disrupt these existing operations by immediately issuing a cease and desist order, the Commission hereby directs Federal Express to file an application for a certificate of convenience and

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[4] The "Statement of Facts" in the Petition contains some conclusions concerning the impact of state motor carrier regulation on the operations of Federal Express. *See* Petition at 7, n. 3. Such assertions are speculative since the Company is not presently regulated by the Commission and, as their principal witness testified, he had "no idea what they [the Commission] would do." Trial Transcript, 122. He also noted that the Company operates "relatively well" under state motor carrier regulation in Massachusetts (*id.* at 116) and has not had any problems operating as an interstate motor carrier under the jurisdiction of the Interstate Commerce Commission. *Id.* at 116-118.

> necessity within thirty (30) days of the date of this Order. The Commission will not attempt to interfere with Federal Express' Tennessee intrastate service provided solely by motor vehicle pending a decision on Federal Express' application, provided such application is filed within thirty (30) days of the date of this Order and provided Federal Express expeditiously prosecutes its application.

Show Cause Order, at 24.

Federal Express appealed the Commission's decision to the Tennessee Court of Appeals as provided by the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-322. Alleging that the Company would be hamstrung by state regulation and that the mere filing of an application for intrastate authority "may moot the substantial issues raised on appeal," Federal Express asked the state court to stay the Commission's order pending judicial review. "Application for Immediate Stay and Immediate Hearing," at 2 (Joint Appendix in Sixth Circuit at 678) (hereinafter JA-___).

Following a hearing, the Tennessee Court of Appeals issued a short order on August 6, 1987, denying the application for a stay. In response to the company's argument that compliance with the agency's order might be construed as a waiver of the company's preemption claims, the Tennessee Court of Appeals explicitly assured Federal Express that "compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for review of said order." Order Denying Stay (Tenn. Ct. App. August 6, 1987), JA-653.

Federal Express did not appeal the state court's decision. Instead, on the day after the state court's ruling, the

company filed a complaint and application for a stay in the United States District Court for the Middle District of Tennessee. The district court issued a temporary restraining order on August 7, 1987, prohibiting the Commission from enforcing its order. JA-135. Despite the state court's explicit language to the contrary, the court wrote – without explanation – that the "filing of an application may render moot the plaintiff's constitutional and federal statutory claims and unduly interfere with and harm the plaintiff's alleged integrated transportation system." JA-136.

As described in the district court's decision (693 F. Supp. at 601-602), the case was tried on September 10 and 11, 1987. At the outset, Federal Express announced that it had moved to dismiss its state court appeal "apparently hoping to undercut any possibility of abstention."[5] *Id.* at 601. The court then heard testimony from two Federal Express executives and oral argument on the issues of preemption and abstention. Purolator Courier participated in the trial as a co-defendant in support of the Commission but is not a party to this appeal.

On June 16, 1988, the district court issued an opinion dismissing Federal Express's suit on the grounds that the court had no jurisdiction over the company's federal preemption claims. *See Public Service Commission v. Wycoff*, 344 U.S. 237 (1952), and *Michigan Savings and Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982). The district court also noted that dismissal of the lawsuit "comports

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[5] The Company moved to dismiss its state appeal on September 9, 1987. The Court of Appeals granted the motion on September 11, 1987.

with the deference entitled to state administrative decisions and state court review emphasized in *Wycoff*." *Id.* at 607. Using the language and logic of the *Younger*[6] abstention doctrine, the court continued:

> Essentially, Federal Express is substituting this Court for a carefully devised avenue of appeal through the Tennessee Supreme Court, and the U.S. Supreme Court. . . . For this Court to encourage the maneuver employed by Federal Express in this case would undercut important principles of federalism.

Id.

All parties filed motions asking the district court to reconsider its ruling on subject matter jurisdiction. The district court, however, issued a second order, reaffirming the first, on August 17, 1989. *Id.* at 607-617.

On appeal, Federal Express again challenged the district court's decision on subject matter jurisdiction. The Commission, arguing that the district court had reached "the right decision for the wrong reason," asked the Sixth Circuit to hold that the *Younger* abstention doctrine, not *Wycoff*, required dismissal of the company's federal lawsuit. The Sixth Circuit initially affirmed district court but, upon reconsideration, reversed its ruling on subject matter jurisdiction and remanded the case for consideration of the abstention issue in light of its decision in *CSXT, Inc. v. Pitz*, 883 F.2d 468 (6th Cir. 1989). *See Federal Express v. Tennessee Public Service Commission*, 909 F.2d 1483 (6th Cir. 1989) (Table).

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[6] *Younger v. Harris*, 401 U.S. 37 (1971).

On remand, the parties filed additional briefs and argued orally on the abstention question. In April, 1990, the district court issued an opinion adopting the Sixth Circuit's suggestion that *Younger* and its decision in *CSXT* required dismissal of the company's lawsuit. *Federal Express Corp. v. Tennessee Public Service Commission*, 738 F. Supp. 1140 (M.D. Tenn. 1990). A year later, the Sixth Circuit affirmed. *Federal Express Corp v. Tenn. Public Service Commission*, 925 F.2d 962 (6th Cir. 1991).

SUMMARY OF ARGUMENT

This case represents a straightforward application of the *Younger* abstention doctrine. There is no dispute that this case involves a quasi-judicial decision by a state agency and that the state's interest in motor carrier regulation is sufficient to invoke *Younger*. In its petition to this Court, Federal Express contends that *Younger* is inapplicable because (1) the Commission waived the right to raise the abstention issue; (2) there is no longer a "pending" state proceeding since Federal Express withdrew its state court appeal shortly before the federal trial began; and (3) the carrier's federal preemption argument is facially conclusive.

Each of these arguments is addressed by both the district court and the Sixth Circuit.

1. Once the trial court raised the abstention issue, the Commission argued "vehemently" (district court opinion, A-26) and "persistently" (court of appeals opinion, A-8) that the suit should be dismissed on abstention

grounds. The carrier's waiver argument is based on a misstatement by Commission counsel during oral argument in the trial court; counsel, however, later corrected that statement in his post-trial brief and has argued in favor of abstention since that time. There has never been an express, intentional waiver of the Commission's right to raise the issue.

2. Since *Ex Parte Young*, 209 U.S. 123 (1908), it has been established that the federal courts "cannot, of course, interfere in a case where the proceedings were already pending in a state court." *Id.*, at 166-167. That Federal Express later withdrew its state court appeal is irrelevant. The proper time for determining the applicability of *Younger* is the day "when this [the federal] suit was filed." *Pennzoil v. Texaco*, 481 U.S. 1, 17 (1987).

3. The carrier's federal preemption argument is, to say the least, not "facially conclusive." In fact, the only court to rule on the merits of the preemption issue has ruled against the carrier's position. *Federal Express Corp. v. California Public Utilities Commission*, 716 F.Supp. 1229, 1302-1303 (N.D. Cal. 1989). That decision is now on appeal to the Ninth Circuit.

ARGUMENT

I. THE COMMISSION HAS NOT WAIVED THE ABSTENTION ISSUE.

The district court, the forum best able to analyze the parties' tactics in this case, concluded that the Commission "has not waived the abstention argument" but, "in its papers and through the hearing . . . , continued to raise

the abstention question and vehemently argued" that the district court should dismiss the plaintiff's complaint.[7] A-26. The Sixth Circuit agreed, "Our review of the proceedings in the district court reveals that the Commission did not waive the abstention arguments." A-8.

The district court first raised the abstention issue during a status conference in chambers on August 20, 1987, two weeks after the complaint was filed. A-6. In response to the district court's suggestion, the Commission filed a "Supplement to Trial Brief of Defendants" on September 2, 1987, urging the court to dismiss this suit on abstention grounds. SA-72. Referring to the company's pending suit in state court, the Commission argued (SA-77) that Federal Express "will not be harmed by an order granting judgment on the basis of abstention since it has a pending appeal in the Tennessee Court of Appeals where its rights can be fully adjudicated." Federal Express filed a reply brief on September 8, 1987, arguing primarily that abstention does not apply to federal preemption claims.

On September 10, 1987, the district court heard argument from Federal Express, the Commission, and Purolator Courier on the abstention issue. A-7. At the outset, counsel for Federal Express announced that the company

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[7] The district court's discussion of the waiver issue notes that the Commission "vehemently argued" that the court "did not have subject matter jurisdiction" over the suit. A-26. The district court's reference to "subject matter jurisdiction" is clearly intended to refer to the abstention issue.

had filed a motion to dismiss its state court appeal.[8] Trial Transcript, 2. The parties then argued the abstention question. *Id.* at 2-28.[9] The district court postponed consideration of that question "pending consideration of the merits' of the lawsuit and then proceeded with the trial. *Id.* at 28.

The Court heard testimony on September 10, 1987, and closing arguments on September 11, 1987, during which all three parties again discussed the abstention issue. *Id.* at 207-227. Counsel for the Commission stated that, in light of the decision by Federal Express to dismiss its state court appeal, the abstention question "is no longer an issue in this case." *Id.* at 214. Counsel for Purolator Courier disagreed, however, pointing out that the abstention issue was still before the Court, at least until the Tennessee Court of Appeals ruled on the motion to dismiss. *Id.* at 223, 227. Purolator Courier also requested and received permission to file an amended answer (*id.* at 226) in which it specifically pled the abstention issue.[10]

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[8] During argument on the abstention issue, counsel for Federal Express said, "This Court should not abstain, first of all, because there is no pending State case. We move[d] to dismiss that." Trial Transcript, 11. As the district court noted, the company dismissed its state appeal "apparently hoping the undercut any possibility of abstention." 693 F. Supp. at 601.

[9] Federal Express argued two points. First, the company said abstention did not apply because there was no longer a pending state case. Second, counsel said that abstention should not apply to federal preemption claims. Trial Transcript, 9.

[10] Answer of Purolator Courier Corp., filed September 24, 1987, paragraphs 1 and 25.

The district court then took the entire matter under advisement and "requested additional briefs on the issues of abstention and *res judicata*." 693 F.Supp. at 602. In their post-hearing briefs, Federal Express and Purolator Courier once more urged the district court to dismiss this suit under the abstention doctrine. Counsel for the Commission expressly retracted his statement made during closing argument and wrote that, based on further research, it was clear that the abstention question was still before the Court.[11]

Abstention can be waived, as this Court has explained, because "if the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back to the State's own system." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-80 (1977). A state, for example, may voluntarily submit to federal jurisdiction "in order to obtain a more expeditious and final resolution of the merits of the constitutional issue." *Brown v. Hotel Employees*, 468 U.S. 491, 500, n.9 (1984). This Court noted that in each such case there had been an express, intentional waiver of the State's right to raise the abstention issue. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 626 (1986).

Here, the Commission never waived, expressly or otherwise, its right to argue that this lawsuit should have been resolved in the state courts. Except for the error by Commission counsel during closing argument, a mistake

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[11] Supplemental Brief of the Tennessee Public Service Commission, filed November 12, 1987, p.1. S.A.-127.

he corrected in the Commissioner's post-hearing brief, both defendants repeatedly argued to the district court, before and after the trial, that this case should be dismissed on abstention grounds.[12]

Once the abstention issue had been raised, Federal Express faced a strategic dilemma. The company had to decide whether to pursue its state court appeal – and risk losing the abstention argument – or dismiss its state case in the hope that the abstention issue would disappear.

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[12] Federal Express highlights the fact that the Commission failed to raise the abstention issue in its answer to the complaint. But there is no rule – and none cited by the company – that abstention must be raised in the pleadings. The abstention doctrine can be raised by any party, or by the court, at anytime. *See Sosna v. Iowa*, 419 U.S. 393, 396 (1975) (*Younger* abstention was raised for the first time by the Supreme Court); *CSXT*, 883 F.2d at 471 (*Younger* abstention was first raised in a motion filed by an intervening defendant); and *Louisiana Power and Light v. Thibodaux*, 360 U.S. 25 (1959) (this Court upheld the right of the district court to raise an abstention question, *sua sponte*, and require the parties to seek clarification from the state courts even though no party had requested such action).

Federal Express also points out that the Commission moved for a prompt trial pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. Nothing in that unopposed motion, which was granted on the same day that the Court raised the abstention issue, had anything to do with *Younger*; nor was it inconsistent for the Commission, having been enjoined from enforcing state law, to urge the Court either to dismiss the suit on abstention grounds or to begin trial as soon as possible.

Federal Express chose the second approach but, as discussed in § III, *infra* at 18, below, the abstention issue has not disappeared.

II. FEDERAL EXPRESS'S PREEMPTION CLAIM IS NOT "FACIALLY CONCLUSIVE."

Alleging that federal preemption of state regulation is "clear cut" and "facially conclusive", Federal Express argues that ordinary abstention principles must give way in these unusual circumstances. Petition for Writ of Certiorari at 15-19. The argument is without merit. Federal Express is apparently trying to bring this case under an exception to the abstention doctrine, recognized in the *Younger* case itself, which provides that federal court intervention is appropriate if the plaintiff demonstrates that the challenged state action is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 410 U.S. at 53-54. *See New Orleans Public Service Commission v. City Council of New Orleans*, 491 U.S. 350 (1989).

This exception is, to say the least, rarely used. As the Sixth Circuit pointed out in *Zalman*, 802 F.2d at 205, "The Supreme Court has never found it to be applicable since it first announced the exception in *Younger*." Some commentators and courts believe the exception no longer exists. *Id.* at 206; 17A Wright, Miller, and Cooper, *Federal Practice and Procedure*, § 4255 (1988).

The short answer to the company's argument is the district court opinion in *Federal Express Corp. v. California Public Service Commission*, 716 F. Supp. at 1302-1303, which rejects convincingly the very preemption arguments raised by Federal Express in this lawsuit. Whether or not that lower court opinion is affirmed on appeal, it is evident that the company's preemption arguments are not "facially conclusive."

To support its argument, the company cites three cases interpreting, in different contexts, the preemption language of the Airline Deregulation Act, 49 U.S.C. 1305(a)(1). Two cases hold that the Act preempts state regulation regarding the advertising of airline fares.[13] The third case involves a state scheme to impose landing fees.[14] Each case involved laws "relating to rates routes, or services of airlines." *Trans World Airlines v. Mattox*, 879 F.2d at 779.

But as the district court in California pointed out, the preemption language in the Airline Deregulation Act has been found inapplicable in cases involving activities not directly related to airline service. *Federal Express*, 716 F. Supp. at 1302. This determination – whether door-to-door truck deliveries are "related to" the services of an "air carrier" – is, of course, the heart of the whole matter. The

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[13] *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990); and *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751 (7th Cir. 1989).

[14] *New England Legal Foundation v. Mass. Port Auth.*, 883 F.2d 157 (1st Cir. 1989).

California district court "found no cases in which the phrase 'relating to' . . . has been applied to regularly conducted ground transportation." *Id.* at 1303. No one, other than Federal Express, seems to find the company's preemption claim "facially conclusive."

III. STATE PROCEEDINGS WERE "ONGOING" WHEN THIS FEDERAL SUIT WAS FILED.

"The proper time for determining the applicability of *Younger* abstention is the time that the federal complaint is filed." *Zalman v. Armstrong*, 802 F.2d 199, 204 (6th Cir. 1985).[15]

This lawsuit was filed on August 7, 1987. On that day, Federal Express and the Commission were both parties in a state court proceeding filed a month earlier by Federal Express. Although the company later dismissed its state case, it is now settled that, even if the state courts can no longer grant relief, *Younger* applies if state judicial proceedings were pending "when this [federal] suit was

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[15] The "day of filing" rule is as old as the power of the federal courts to issue injunctions against state officials. In *Ex Parte Young*, 209 U.S. 123 (1908), this Court established the principle that a federal court could enjoin state officials from enforcing state law against a regulated carrier in violation of the United States Constitution. Noting that such suits should normally be brought in the state courts, this Court cautioned, "[T]he federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court." *Id.* at 162, 166-167.

filed." *Pennzoil v. Texaco*, 481 U.S. at 17.[16] *See also Huffman v. Pursue*, 420 U.S. 592 (1975).

Federal Express makes two arguments in response. First, the company relies on two abstention cases, *Thomas v. Texas State Board of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987), and *Bacon v. Rutland Railroad Co.*, 232 U.S. 134 (1914), where both plaintiffs were allowed to challenge state administrative actions by filing suit in the federal rather than the state courts. Assuming, however, that *Thomas* and *Bacon* are still good law,[17] neither decision is relevant to the "day-of-filing" rule. The plaintiff in *Bacon*, as this Court pointed out sixty years later, never initiated state judicial proceedings, *Huffman*, 420 U.S. at 609, n.21.

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[16] In that case, Texaco failed to raise its federal claims in the state courts and, by the time the company's federal suit reached this Court, Texaco no longer had any state remedies to pursue. The Court nevertheless ruled that *Younger* required dismissal of the company's federal complaint, explaining that "Texaco cannot escape *Younger* abstention by failing to assert its state remedies in a timely manner." 481 U.S. at 16, n.16. "[W]e cannot say that those [state] courts, *when this suit was filed*, would have been any less inclined than a federal court to address and decide the federal constitutional claims." *Id.* at 17 (emphasis added).

[17] This Court has recently suggested that if the underlying state administrative proceeding is "judicial" in nature, the failure to pursue state court appeals will bar federal relief even if no state proceedings are pending when the federal suit is filed. *New Orleans Public Service Comm. v. New Orleans City Council*, 491 U.S. 350 (1989).

The plaintiff in *Thomas* withdrew his state appeal before filing his federal lawsuit. *Thomas*, 807 F.2d at 456 (explaining that "at the time this suit was filed, no state action was pending"). In neither case was there a state proceeding pending when the plaintiff filed his federal complaint.

The district court's decision, moreover, goes further than the "day-of-filing" rule. Relying on *Pennzoil*, *Huffman*, and *New Orleans*, the district court ruled that *Younger* requires exhaustion of state court remedies and would compel dismissal of this lawsuit even if there had been no state suit pending at the time Federal Express filed its federal complaint. A-19 through A-23.

The district court's analysis is supported by the Eighth Circuit's decision last year in *Alleghany Corp. v. McCartney*, 896 F.2d 1138, (8th Cir. 1990), in which the court dismissed on *Younger* grounds a preemption challenge to the jurisdiction of a state insurance commissioner. There, as here, the federal plaintiff participated unsuccessfully in proceedings before the state agency but, instead of pursuing its state court remedies, filed suit in the United States District Court. The Eighth Circuit reached the same conclusion as the district court in this case about the applicability of *Younger*:

> Alleghany asserts that even if the proceeding was judicial in nature, abstention is nevertheless improper because the proceeding is no longer pending. The Supreme Court's holding in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), requires that we reject this argument. . . . Since *Huffman*, courts have consistently held that a party cannot avoid *Younger* by choosing not to pursue available state appellate remedies. *See*

Pennzoil Co. v. Texaco, 481 U.S. 1, 16-17 (1987); *Coley v. Clinton*, 635 F.2d 1364, 1371 (8th Cir. 1980).

NOPSI faced the question of the applicability of the exhaustion requirement to completed administrative proceedings, but assumed that the exhaustion requirement would apply to both continuing and final administrative proceedings.[1] The Court noted that *Dayton Christian Schools* suggests that "an administrative proceeding to which *Younger* applies cannot be challenged in federal court even after the administrative action has become final." *NOPSI*, 109 S.Ct. at 2518, n.4.

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[1] The concurring opinion of Chief Justice Rehnquist underscores this principle by stating that nothing in the Court's opinion "alter[s] our prior case law indicating that such proceedings [administrative proceedings which are judicial in nature] should be regarded as 'ongoing' for the purposes of *Younger* abstention until state appellate review is completed." *NOPSI*, 109 S.Ct. at 2521 (Rehnquist, C.J., concurring). Also, the concurring opinion of Justice Blackmun indicates that he believes that a completed administrative proceeding constitutes an ongoing proceeding for *Younger* purposes. *See id.* (Blackmun, J., concurring).

Alleghany Corp. v. McCartney, 896 F.2d at 1144.

The Eighth Circuit's reasoning is convincing. It makes no sense to apply *Younger* to state administrative proceedings that are still pending – as in *CSXT* – but not to require the losing party to exhaust his state appellate remedies. The case of abstention is even stronger here where Federal Express, unlike Alleghany, went to state

court, argued unsuccessfully for a stay, and then filed a federal suit while the state appeal was still pending.

CONCLUSION

The decisions by the district court and the Sixth Circuit are based on the straightforward application of *Younger* principles and are consistent with recent interpretations of *Younger* from this Court and from other federal appellate courts. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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